No. 12,574

IN THE

United States Court of Appeals

For the Ninth Circuit

THE INDEMNITY MARINE ASSURANCE COMPANY, LIMITED,
Appellant,

vs.

FULGENCIA D. CADIENTE,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

INTRODUCTION.

The brief filed on behalf of appellee makes little pretense at rebuttal of appellant's first two points, viz.:

I. The insured vessel was not a constructive total loss when appellee tendered her abandonment;[1] and

II. Failure of appellee to act for the defense, safeguard and recovery of the insured vessel bars her recovery.[2]

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[1]Brief for Appellant, pp. 12-49.
[2]*Id.* pp. 49-53.

It is readily apparent throughout her treatment of these points that appellee, on this appeal, relies entirely upon the theory of constructive acceptance of abandonment for her recovery herein.

Appellee admits frankly that she made no attempt to prove the expense of recovering and repairing the vessel, offering no evidence on that issue.[3] This admission confirms what is already patent on the face of the record, that appellee failed to carry her burden of proving a constructive total loss of MISS PHILIPPINE within the terms of her insurance policy. Since the only ground for recovery set forth in appellee's libel was the allegation that "said vessel did become a constructive total loss within the meaning and coverage of said marine insurance policy" (R. 3), and since the final decree appealed from was entered by the court below on the basis of its opinion and conclusion that appellee "was justified in abandoning the wreck" (R. 23), both decision and decree thereon were clearly erroneous.[4]

Appellee also concedes that she made no effort to rescue the stranded vessel and left her to eventual destruction on the rocks,[5] notwithstanding the availability of reasonable means of salvage which appellant demon-

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[3]Brief for Appellee, pp. 6, 9, 17.

[4]*Klein v. Globe & Rutgers Fire Ins. Co.*, 2 F. (2d) 137 (C.C.A. 3d 1924);
Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618 (C.C.A. 9th 1916);
Standard Marine Ins. Co. v. Nome Beach L. & T. Co., 133 Fed. 636 (C.C.A. 9th 1904);
Soelberg v. Western Assur. Co., 119 Fed. 23 (C.C.A. 9th 1902);
Chicago S.S. Lines v. United States Lloyds, 2 F. (2d) 767 (N.D. Ill. 1924), *aff'd* 12 F. (2d) 733 (C.C.A. 7th 1926).

[5]Brief for Appellee, p. 19.

strated successfully. Having thus failed to use with prudence and honesty the means at her command for saving the vessel and thereby minimizing the loss, appellee will not be permitted to capitalize on her own lack of care and diligence by recovering for a constructive total loss[6]—particularly when appellee has not even tried to prove such a loss.

Hence the sole ground now advanced in support of a recovery by appellee on the insurance policy in question is simply that appellant, by its conduct, implicitly accepted abandonment of the insured vessel.[7] Specifically, appellee now urges that appellant's acts of rescuing the sampan from her perilous position on the rocky beach, of financing her salvage and removal to a safe port, and of declining to exercise any control over her disposition by refusing to instruct the salvor after appellee had tendered abandonment, so exceeded the underwriter's authority conferred by the policy as to constitute constructive acceptance of abandonment.[8] There remaining—by appellee's confession—no other basis on which to justify the decree appealed from, appellant's argument will be addressed to this proposition alone.[9]

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[6]*Chicago S.S. Lines v. United States Lloyds, supra;*
Howland v. Marine Ins. Co. of Alexandria, 12 Fed. Cas. 741, No. 6,798 (C.C.D.C. 1824);
Hundhausen v. U.S. Fire & Marine Ins. Co., 3 Tenn. Cas. 184, 17 S.W. 152 (1875).

[7]Brief for Appellee, p. 26.

[8]*Id.* pp. 26-27, 30.

[9]*See* Brief for Appellant, pp. 53-61.

ARGUMENT.

1. APPELLEE CANNOT RECOVER UNLESS DAMAGE EXCEEDS $21,000.

Nothing could be plainer than this stipulation contained in the policy:

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. (R. 7.)

Other stipulations therein fix the insured value at $21,000 (R. 7, 9). We submit that these terms of the insuring agreement mean just what they purport and must be given full effect accordingly; that is, unless expense of recovering and repairing the vessel exceeds $21,000, the assured cannot recover for a constructive total loss. Appellee admittedly failed to prove such expense. Therefore appellee is not entitled to recover for a constructive total loss.

The record is barren of any admission by appellant, express or implied, of such a nature as might obviate the necessity of proving that expense of recovering and repairing MISS PHILIPPINE exceeded the agreed limit. Appellant never conceded that to be a fact but, on the contrary, consistently denied the existence of such damage from the time its surveyor reported the stranded vessel to be salvageable (R. 129, 145). It demanded by letter of June 9, 1949, that appellee proceed with salvage (R. 111). It expended $1,500 for salvage and the additional cost of having the vessel righted at Kaunakakai (R. 159). It advised appellee's husband and agent on June 13, 1949, when he tendered notice of abandonment, that

it still looked to him to salvage the vessel (R. 189). And in reply to formal notice of total loss and abandonment, it reaffirmed its position that there was no constructive total loss (R. 104). Issue was joined on this ultimate fact (R. 3, 12).

This is but another instance where the assured, being bound by the lawful agreements and stipulations of her policy of insurance, has failed to establish her right to recover by showing a loss within the terms of that policy.[10]

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2. RECOVERY MUST REST ON FACTS ALLEGED AND PROVED.

The verified libel by which appellee instituted this suit alleged that the insured vessel became a constructive total loss within the meaning and coverage of the insurance policy, that appellee duly performed all the conditions required of her by the policy, and that she was therefore entitled to receive the loss payable thereunder (R. 3). This last allegation is, of course, merely the pleader's conclusion; the first two form the ultimate, probative facts upon which that conclusion must stand or fall.

Now appellee says, in effect, that the veracity of these sworn allegations of fact is of no consequence, because her conclusion and the decree adopting it can be supported on another ground not mentioned in the libel. Under this freshly-conceived theory of suit, we are told, whether the vessel was a constructive total loss within the

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[10] *Soelberg v. Western Assur. Co.*, 119 Fed. 23 (C.C.A. 9th 1902), and cases cited note 4 *supra*.

terms of the policy and whether the assured performed a vital condition imposed by that policy are immaterial.[11]

In short, appellee on this appeal, like the court below in its decision and decree, relies upon asserted facts quite different from those set forth in her libel as the basis for recovery on the policy. Both have resorted to complete juxtaposition of issues, the error of which is clear.

It is well stated that[12]—

> In all legal proceedings the judgment must be in accordance with the allegations and the proofs. The court will disregard all proofs outside the issues, and in pronouncing judgment will be restrained and guided by the allegations in the pleading.

In applying this established rule on review of a collision suit in admiralty, the Court of Appeals for the Seventh Circuit held that a respondent's answer alleged fault of libelant's steamer only in that its officers failed to hear or heed the ringing of a fog bell (which was disproved at trial); that the answer contained no averment that libelant's steamer was handled in a negligent manner without proper lookout (as claimed by respondent on appeal) or without coming to a stop (as suggested by the trial court); and there was therefore no pleading by respondent upon which the trial court could base its finding that the steamer was at fault.[13] Respondent's judgment was reversed and judgment for libelant directed.

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[11]Brief for Appellee, p. 26.

[12]*Goodrich Transit Co. v. City of Chicago*, 4 F. (2d) 636, 637 (C.C.A. 7th 1925).

[13]*Id.* at 638.

And in another case in admiralty, the Supreme Court held that allegations of negligence in bad stowage and allowing water to leak into the ship's hold (which were not proved) could not support a recovery for injury to cargo found not attributable to those specified causes.[14]

Appellee's present contention serves only to emphasize the error of the District Court in considering issues other than those made by the pleadings and rendering judgment on such issues. It is axiomatic that[15]—

> A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.

Appellee finds herself in that position.

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3. ACCEPTANCE CAN OCCUR ONLY AFTER ABANDONMENT.

Appellant does not deny that it dispatched the salvage tug MAIZIE-C from Honolulu on June 10, 1949, to succor the stranded vessel (R. 49-50), or that on June 11th it executed a formal salvage agreement with King Limited, owner of the tug, by which it committed $1,500 to salvage charges (R. 80-83), or that its agent and the salvor succeeded on June 12th in floating the vessel from the strand, after which the salvor took her under tow to a safe port (R. 52, 130).

Appellant does urge that no tender of abandonment was made by appellee until after these events has tran-

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[14] *McKinlay v. Morish*, 21 How. 343 (U.S. 1858).

[15] *Sylvan Beach v. Koch*, 140 F. (2d) 852, 861 (C.C.A. 8th 1944).

spired and MISS PHILIPPINE was safely in tow on the high seas.[16] The record of evidence bears out this contention, establishing that appellee first gave notice of abandonment on June 13th (R. 175-176, 188-189, 192-198). Clearly no act of appellant performed prior to that time could be deemed an acceptance of an abandonment which still remained inchoate. The doctrine that any act of the underwriter *in consequence of an abandonment*, which could be justified only under a right derived from it, may be decisive evidence of an acceptance, has no application to acts performed before notice of the abandonment has been communicated to the underwriter.[17]

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4. NO ACTS OF APPELLANT CONSTITUTED ACCEPTANCE OF ABANDONMENT.

It has already been shown that appellant's expressed attitude throughout its dealing with respect to MISS PHILIPPINE was unequivocal denial of a constructive total loss and refusal to accept her tendered abandonment. Acts of appellant in effecting rescue and salvage of the vessel prior to her abandonment are immaterial to any inquiry whether, by its conduct, appellant recognized and accepted that abandonment. And in any event, any and all acts of appellant "in recovering, saving, and preserving" the insured vessel were expressly protected by the policy's sue-and-labor clauses (R. 7, 8).

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[16] *See* Brief for Appellant, pp. 29-30, 32-33.

[17] *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U.S. 408, 433 (1890).

This is *not* a case wherein the underwriter, being authorized by the policy to repair the vessel, made insufficient repairs or withheld possession from the assured for an unreasonable time.[18]

Neither is this a case wherein the underwriter salvaged the vessel and put her in drydock for survey and then, having under the policy the right to repair and the duty to return her to the owner, sank her in her former position without making the repairs or notifying her owners.[19]

This policy neither authorized nor required appellant to repair the vessel (R. 6-9). And appellant neither undertook repairs nor undertook salvage with the intention of making repairs. In saving and preserving MISS PHILIPPINE, appellant acted within the protection of the sue-and-labor clauses and did nothing more than it had authority to do without incurring a disavowed liability.[20]

The court below stated (R. 22, 23), and appellee urges repetitiously in her brief, that appellant's refusal to instruct the salvor on June 13th amounted to an "abandonment at sea." That theory, whatever its significance may be, fails to recognize the situation as disclosed by the evidence. In fact, appellee had on that very day tendered

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[18] *Cf. Copelin v. Insurance Co.*, 9 Wall. 461 (U.S. 1869).

[19] *Cf. American Merchant Marine Ins. Co. v. Liberty S. & G. Co.*, 282 Fed. 514 (C.C.A. 3d 1922).

[20] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U.S. 1 (1900);
Richelieu Nav. Co. v. Boston Ins. Co., supra note 17;
Jeffcott v. Aetna Ins. Co., 32 F. Supp. 409 (S.D. N.Y. 1940).

abandonment and been told by appellant that it expected her to salvage the vessel (R. 175-176, 189); the salvor had informed both parties that the vessel was in tow on the high seas, that the $1,500 invested by appellant in salvage was exhausted, and that it wanted further instructions (R. 190-191); and then, in the presence of appellee's attorney, appellant stated it had no further instructions (R. 191-197). Appellant thereby declined to commit itself to further salvage expenses or to exercise any control over the disposition of the vessel.

Nothing could be further removed from reality than to label this refusal to control as an act "inconsistent with the dominion, control and possession of the assured."[21] It was anything but such dominion and control which could be deemed a recognition of the transfer of ownership consequent to abandonment.

The gist of appellee's theory of recovery seems to be that appellant's refusal to spend more than $1,500 for salvage charges, and also its other acts which resulted in the recovery and salvation of the vessel, "were all done without the consent or authority of appellee."[22] But appellee is bound by the terms of her policy, which authorized appellant to recover, save and preserve the property without any risk that its acts might be considered a waiver or acceptance of abandonment. These sue-and-labor provisions authorizing such acts by the insurer are in the public interest, inure to the benefit of

[21]Brief for Appellee, pp. 26-27.
[22]*Id.* p. 27.

both parties to the policy, and will be given liberal effect to protect the underwriter who minimizes a loss.[23]

Any claim by appellee implying that appellant withheld possession of the vessel, infringing upon her right of dominion and control, is wholly without substance. While she stood by and did nothing, the vessel was rescued, towed safely to port, turned upright and tied buoyant at Kaunakakai wharf—all as the result of appellant's effort and expenditure. The vessel was immediately available for her exclusive disposition (R. 94, 104-105).

It ill becomes appellee to complain now that she did not consent to those acts of appellant, or that appellant did not spend enough money on salvage, and to invoke on such grounds the technical doctrine of constructive acceptance of abandonment. On the record, those claims are clearly without merit.

CONCLUSION.

We submit that the policy of insurance, pleadings and proof in this case afford no basis for holding that appellant had, by its conduct, accepted abandonment of the insured vessel. Appellee having admittedly not proved a constructive total loss, she is not entitled on any ground

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[23] *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, *supra* note 20;
Chicago S.S. Lines v. United States Lloyds, *supra* note 4, 2 F. (2d) 767, *aff'd* 12 F. (2d) 733.

to recover on the policy. The decree of the District Court was therefore erroneous and should be reversed, with direction to enter decree for appellant.

Dated, Honolulu, Hawaii,
November 2, 1950.

Respectfully submitted,
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